No. 11961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC.,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas corporation, JACK BELYEA, doing business as REFRIGERATED EXPRESS COMPANY, DOE ONE, DOE TWO, DOE THREE AND DOE FOUR,

Appellees.

APPELLANT'S OPENING BRIEF.

ALBERT H. ALLEN and
HYMAN GOLDMAN,
9441 Wilshire Boulevard, Beverly Hills,
Attorneys for Appellant.

FILED
SEP 2 1948

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

No. 11961

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC.,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas corporation, JACK BELYEA, doing business as REFRIGERATED EXPRESS COMPANY, DOE ONE, DOE TWO, DOE THREE AND DOE FOUR,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement of the Case.

Appellant shipped a car of frozen shrimp creole from Chicago, Illinois to Los Angeles, California. The merchandise was consigned to the appellant in care of its agent in Los Angeles. Part of the merchandise was destined for Los Angeles and part of it to be re-shipped to Bakersfield and San Francisco.

At the time the shrimp was delivered to the carrier, it was frozen to a temperature of 15 degrees below zero.

It was loaded into a pre-cooled refrigerated car supplied by the carrier. The instructions to the carrier were

> "insure icing to capacity, 13,000 lbs. crushed ice and 3900 lbs. Salt. Re-ice to capacity crushed ice 30 percent salt at all regular icing stations and oftener, if delayed."

The car was then iced to capacity with 13,000 lbs. of crushed ice and 3900 lbs. of salt. As an added precaution, 1000 lbs. of dry ice was placed within the car and on top of the shrimp.

The car left Chicago on April 2nd, 1946 at 11:30 A. M. in good and frozen condition. The car was iced as follows:

On April 2 at 5:00 P. M. the car was re-iced at Savannah, Illinois. It required 3000 lbs. of ice.

On April 4 at 1:40 A. M. the car was re-iced at Kansas City. It required 1000 lbs. of ice.

On April 4 at 2:05 P. M. the car was re-iced again at Kansas City. It required 1000 lbs. of ice.

On April 5, at 6:53 A. M. the car was re-iced at Waynoka. It required 1000 lbs. of ice.

On April 5, at 9:10 P. M. the car was re-iced at Clovis. It required 600 lbs. of ice.

On April 6, at 11:35 A. M. the car was re-iced at Belen. It required 600 lbs. of ice.

On April 7, at 8:45 A. M. the car was re-iced at Winslow. It required 900 lbs. of ice.

On April 7, at 10:20 P. M. the car was re-iced at Needles. It required 900 lbs. of ice.

On April 8, at 7:05 P. M. the car was re-iced at San Bernardino. It required 1500 lbs of ice.

The elapsed time of re-icing after the car was first iced at Chicago is as follows:

First station:	26 hours, 45 minutes.
Second station:	32 hours, 40 minutes.
Third station:	12 hours, 25 minutes.
Fourth station:	16 hours, 48 minutes.
Fifth station:	13 hours, 17 minutes.
Sixth station:	14 hours, 25 minutes.
Seventh station:	21 hours, 10 minutes.
Eighth station:	12 hours, 35 minutes.
Ninth station:	20 hours, 45 minutes.

On April 11, at 11:30 A. M., the car was made available to appellant at the Bay Street Perishable Team Track in Los Angeles for the purpose of unloading. During all of this time, the car was in the control and possession of the carrier. On April 10, the maximum temperature in Los Angeles was 85 degrees and on April 11, it reached 88 decrees. *For 64 hours and 25 minutes the car was not re-iced.*

The average icing time between icing stations, from the time the car left Chicago to the time it arrived in San Bernardino was 18 hours and 50 minutes. The average amount of ice which was added at each icing station was 1166 lbs. of ice.

Though Los Angeles is a regular icing station, no ice was added in Los Angeles. No ice was added to the car after it left San Bernardino.

Usually, when an iced car is opened there is a rush of cold air from the car, and on a warm day a vapor is emitted when the door is opened. When this car was opened there was no rush of cold air and there was no vapor. Though the temperature of the car should have

been 5 degrees or less, the temperature in the car had risen to 54 degrees, which was the temperature when the door was opened.

The shrimp should have arrived in a hard and frozen condition. When the trucker, Belyea, opened the car, he immediately observed that the cartons of shrimp nearest the door were defrosted and soft. It was so wet and soft that when he put his finger against the carton, his finger went through the outside carton, through the inner container and into the shrimp itself. Belyea immediately notified Santa Fe's agent and notified the Los Angeles consignee who was to receive 550 cartons of shrimp.

There was a shortage of frozen shrimp in Los Angeles and the local merchant who was to receive 550 cartons endeavored to salvage what he was to receive. The trucker Belyea then handpicked 550 of the hardest cartons and delivered them to the merchant in Los Angeles where they were immediately placed in a refrigerator. The merchant subsequently disposed of the shrimp in his course of trade. He made no chemical analysis of the shrimp he handled nor did he attempt to determine whether the quality had been affected. He made no attempt to determine whether it was good or bad.

The trucker, Belyea, then had on his hands the remaining 450 cartons which were destined for Bakersfield and San Francisco. He attempted to find refrigerated storage space in Los Angeles rather than move the shrimp to Bakersfield and San Francisco, but there was no storage space available. Though he called every refrigeration

concern in Los Angeles and made long distance calls as far as Pomona, he was unable to find any storage house that had any space.

The trucker, Belyea, was then faced with a dilemma of whether to leave the shrimp in the car to rot or attempt to move it to the merchants in Bakersfield and San Francisco. He elected the former course as to 35 cartons of shrimp which were so soft as to be visibly deteriorated and contaminated. He elected the latter course as to the remaining 415 cartons which he attempted to salvage.

Belyea's truck was a modern refrigerated truck, insulated on the floor with six inches of cork. The walls and ceiling of the truck were insulated with six inches of spun glass and other insulating material. The truck was equipped with blower fans and refrigeration equipment. The refrigerated truck was of modern design and was capable of holding any frozen food product at the temperature of the product when it is placed in the truck. If the temperature of the food when placed in the truck is above 25 degrees the refrigeration equipment in the truck will reduce the temperature at least ten degrees.

At the time Belyea loaded the shrimp in the truck, the truck already was laden with frozen broccoli and frozen cauliflower, which likewise was destined for Bakersfield and San Francisco. As soon as the shrimp was loaded the truck proceeded on its course.

The truck arrived in Bakersfield the following morning. The trucker delivered the shrimp, broccoli and cauliflower to the merchant. The broccoli and cauliflower were

visibly hard and were accepted by the merchant, but the shrimp creole was soft and was rejected. Though placed in the storage house of the merchant, the merchant refused to accept the shrimp.

The truck then proceeded to San Francisco. Here again, the broccoli, cauliflower and shrimp were delivered to their destination. Again the cauliflower and broccoli arrived in a good, hard and frozen condition and were accepted by the merchant. The shrimp creole was rejected as being soft and spoiled. Though the cartons were placed in storage, the shrimp was spoiled and it was stipulated that the 415 cartons of shrimp creole was totally unfit for human consumption and a total loss.

An expert chemist determined that when frozen food, such as shrimp, reaches a temperature of 20 degrees, it starts to deteriorate and loses its color, fragrance and quality. Refreezing will not restore its color, fragrance or quality. When frozen shrimp reaches a temperature of 20 degrees it commences to defrost and must be consumed immediately. The chemist determined that frozen food products must be kept at a temperature at least below 20 degrees.

The above facts are all concededly true. The Court granted damages for 40 cartons of shrimp, 35 of which were left in the freight car. The Court refused to grant damages for the 415 cartons of shrimp which were transferred to Bakersfield and San Francisco and which appellees stipulated were spoiled and not fit for human consumption.

I.

The Conclusions of Law and Judgment Are Not Supported by the Findings of Fact and Are in Conflict Therewith.

The Findings of Fact, when reduced to their simplest form, set forth:

A. The shrimp creole was in good and frozen condition prior to delivery to the carrier and was delivered to the carrier in a good and frozen condition with proper and adequate instructions. [Findings of Fact 4, 5, 6, 7 and 8—Tr. pp. 19-21.]

B. The shrimp creole arrived in a car which was warm, having a temperature of 54 degrees and that the visible cartons of shrimp near the door were wet, soft, defrosted and spoiled. [Findings of Fact 16—Tr. pp. 23-24.]

C. That upon arrival, 415 cartons were taken from the car and loaded in a refrigerated truck which also carried frozen cauliflower and broccoli; that the truck then went to Bakersfield and San Francisco and arrived there the following morning; that the cauliflower and broccoli were hard and frozen, but the shrimp was soft and spoiled and was a total loss to the plaintiff. That there was no intervening act affecting the shrimp from the time the shrimp arrived in Los Angeles and the time it was delivered in Bakersfield and San Francisco. [Findings of Fact 19, 20, 21—Tr. pp. 24-26.]

D. The defendant Belyea who opened the car and removed the shrimp and whose truck was used to reship the shrimp to Bakersfield and San Francisco was not guilty of negligence. [Findings of Fact 24—Tr. p. 26.]

From the foregoing Findings of Fact only one conclusion can be drawn, namely, that since the shrimp was in good condition and properly frozen when shipped, and it arrived in a damaged condition, and since there was no negligence on the part of Belyea or any intervening act which could be responsible for the damage, that the appellee was negligent and failed to perform its contract of carriage. As a result thereof, appellant suffered damages for all the cartons that were condemned.

Delivery of merchandise made to a carrier in good condition but is received by the consignee in a deteriorated condition, makes out a *prima facie* case and thereafter the burden of proof is on the defendant carrier that the damage, if any, was no fault of the carrier. The burden of proof is then on the carrier and he must prove that he was free from neglect and that the damage to the goods resulted either from an act of God, public enemy or the inherent nature of the goods themselves. *Crinella v. Northwestern Pacific Railroad Co.,* 85 Cal. App. 440, 259 Pac. 774; *Hall & Long v. Railroad Companies,* 80 U. S. 13 Wall. 367, 372, 20 L. Ed. 659; *Bonstein v. Baltimore & O. R. Co.,* 29 Fed. Supp. 837.

In the instant case the evidence was and the Court found that the merchandise was delivered to the appellee in good condition and received by the appellant in bad condition and from this finding there can be only one conclusion—that the appellee was negligent and appellant is entitled to damages for the total amount of the loss.

The Court found that there were between twenty-five and forty cases of shrimp creole which were visibly defrosted and spoiled. The evidence was and the Court found that these cases were permitted to remain in the freight car as being too rotten to move. [Findings of Fact 16—Tr. p.

23.] The evidence was and the Court found, however, that in addition to the cases which were *visibly* defrosted, there were 415 cases which, *when they arrived in Bakersfield and San Francisco, were damaged,* and that they were contaminated, unfit for human consumption and were a total loss. It is, therefore, inconceivable as to why the Court should have rendered judgment for 40 cases when, as a matter of fact, a total of 450 cases were damaged.

The defendant Belyea who opened the car found between 25 and 40 cases so soft that he could put his finger through the cartons. [Findings of Fact 16, Tr. p. 23.] Belyea believed all the cases were soft, and he tried to find refrigeration space to attempt to refreeze them and salvage what he could. There was no evidence that the cartons in the car were hard.

The evidence was and the Court found that Belyea called every refrigeration plant in Los Angeles and even as far as Pomona, in an attempt to find a plant to refreeze the shrimp. He hesitated hauling the shrimp to Bakersfield and San Francisco when in his opinion the cartons of shrimp were already damaged. [Findings of Fact 18—Tr. p. 24.] But Belyea had no alternative. Not finding refrigeration space, he attempted to salvage what he thought could be salvaged and he did this by the only means at his disposal. He placed the shrimp in his refrigerated truck and moved the merchandise to the consignees at Bakersfield and San Francisco where they were rejected.

Belyea could have been less resourceful in his desire to salvage what he could from a bad situation. He could have refused to remove the shrimp from the car because

the car was warm and it was apparent that there was damage to the cartons of shrimp. He could have permitted all of the cartons to remain in the car to rot. There would then have been no question as to appellant's damage. But because Belyea attempted to prevent a loss to both appellee and appellant, the Court erroneously concluded that the appellant should not recover.

The Court undoubtedly came to the erroneous conclusion that since the 415 cases were not *visibly* spoiled, that therefore they were undamaged. If Belyea's truck were not of modern design and if Belyea's truck were unrefrigerated, this conclusion or inference might apply, but the facts as found by the Court are so contrary as does not warrant such an inference or such a conclusion.

The facts as found by the Court prevent such conclusion or any such inference. Whatever happened to the shrimp happened before the shrimp was unloaded in Los Angeles. This same refrigerated truck which hauled the shrimp from Los Angeles to Bakersfield and San Francisco also carried as part of its cargo frozen cauliflower and frozen broccoli. The frozen cauliflower and frozen broccoli arrived in Bakersfield and San Francisco hard and frozen and in good condition. If anything intervened from the time the shrimp was removed from appellee's freight car in Los Angeles and placed on Belyea's truck and the time it arrived in Bakersfield and San Francisco, that same act would have similarly damaged the cauliflower and the broccoli. They too required refrigeration and were frozen perishable commodities, the same as the shrimp. But still the facts are and the Court found that

the broccoli and cauliflower arrived in Bakersfield and San Francisco in good condition.

It is, therefore, only logical to conclude that since the shrimp arrived in Bakersfield and San Francisco in a damaged condition, but the cauliflower and broccoli on the same truck arrived in good condition, that the shrimp was in a damaged condition when it was placed in the truck, and the appellee is liable for this damage. Appellant should not be penalized because of an act of charity on the part of Belyea in attempting to salvage what he could, even though his attempt proved futile. The Court should have rendered judgment for appellant for all the cartons which were damaged, to-wit, 450 cartons.

The appellee Santa Fe failed to offer any evidence whatsoever of any act or thing or condition that could possibly have caused damage to the shrimp between the time it left Los Angeles and was received in Bakersfield and San Francisco. The appellant offered positive and uncontradicted evidence that nothing occurred between the time the shrimp left Los Angeles and the time it arrived in a spoiled condition in Bakersfield and San Francisco. The trial court found Belyea was not negligent. These findings were approved as to form by the appellee and they offered no other findings. The Court's reasoning, therefore, that something may have happened was not based on the evidence or facts, is contrary to its own findings and is based purely on supposition or conjecture. The Court erred in failing to give appellant judgment for its full loss.

II.

The Appellee Was Negligent in Permitting a Perishable Commodity to Remain in a Freight Car Over Which It Had Full Control and Jurisdiction without Icing for Sixty-Four Hours and Twenty-Five Minutes and This Neglect and Breach of Carriage Was the Proximate Cause of the Damage Which Appellant Suffered.

The Court found that though the car arrived in Los Angeles on April 10, it was first made available to the appellant on April 11, 1946. [Findings of Fact 11—Tr. p. 21.] The Court further found that no ice or salt was placed in the car between the time the car left San Bernardino on April 8, 1946, and the time it was unloaded on April 11, 1946. During all of this time the car was in the possession of the appellee, Santa Fe. [Findings of Fact 12—Tr. p. 22.] The Court found that Los Angeles was a regular icing station [Findings of Fact 13—Tr. p. 32] and that the icing instructions required the appellee Santa Fe to ice and salt at all regular icing stations and oftener, if delayed. [Findings of Fact 6—Tr. p. 20.]

When the car left Chicago on April 2, 1946, the mean temperature for a 24-hour period was 41 degrees. When the car reached Savannah, Illinois, 26 hours and 45 minutes later, and with the temperature remaining the same, 3000 pounds of ice were added and a proportionate amount of salt. At each icing station thereafter, ice and salt were added. While the temperatures through the various cities through which the car passed enroute to Los Angeles remained at an average of approximately 60 degrees, 1166 pounds of ice were required and were added on an average of every 18 hours and 50 minutes. When the car reached San Bernardino on April 8, 1946, the maximum tempera-

ture was 62 degrees, the minimum temperature 47 degrees and the mean temperature 54 degrees. While the temperature remained relatively constant, the car required 1500 pounds of ice and this was added in San Bernardino.

The icing instruction required the carrier to ice this car at regular icing stations. Los Angeles is a regular icing station. [Findings of Fact 13—Tr. p. 22.] The instructions further required the carrier to ice oftener if delayed. [Findings of Fact 6—Tr. p. 20.] Though the car was in Los Angeles, a regular icing station, from April 9 to April 11, the carrier furnished no ice. The Court specifically found "that no ice or salt was placed in the car between the time the car left San Bernardino on April 8, 1946 and the time it was unloaded on April 11, 1946 at the Bay Street Perishable Team Track in Los Angeles, which said track is owned by and under the control, supervision and jurisdiction of Santa Fe." [Findings of Fact 12—Tr. p. 22.]

From April 8, however, when the car left San Bernardino and April 11, when the car was available to appellant in Los Angeles, the temperature rose from 68 degrees to 88 degrees. Notwithstanding this sharp rise in temperature for a period of three days, no ice was added to this car. *For a period of 64 hours and 25 minutes, the appellee permitted this car to remain un-iced in a broiling sun.* Common logic would lead to only one conclusion—that the appellee Santa Fe negligently permitted this car to remain un-iced and unattended, with knowledge that the car contained a perishable food which required icing. This was negligence and the proximate cause of the damage.

When a properly refrigerated car is opened on a warm day, a rush of cold air escapes and a vapor is given off.

When the door of this car was opened, there was no rush of cold air and no vapor was given, though it was a warm day. This car was not properly refrigerated. It was warm.

The visible merchandise near the door was wet, soft and defrosted. [Findings of Fact 16—Tr. p. 23.] It was so soft that when Belyea placed his finger against the carton, his finger penetrated through the outer carton, the inner package and the shrimp creole itself. [Findings of Fact 16—Tr. p. 23.] The carton should have been frozen solid and as hard as a rock.

When Belyea noted the car was warm and the merchandise soft, he immediately obtained a thermometer, placed it in the car, closed the doors and permitted the thermometer to remain there for fifteen minutes to determine the temperature of the car. [Findings of Fact 16—Tr. p. 23.] While the temperature of the car should have been 5 degrees, the temperature of the car was actually *54* degrees. The merchandise had already defrosted and spoiled.

The Court found that the carrier permitted the car to remain without icing for 64 hours and 25 minutes. This evidence, coupled with the fact that the appellee produced no contrary evidence and the finding of the Court that the shrimp was a total loss, established without a doubt the negligence of the appellee. The appellee was unable to show that the damage resulted from acts beyond its control such as an act of God, public enemy or the inherent nature of the goods themselves. The failure to meet this burden of proof warranted a recovery in favor of the appellant.

Appellants called Raymond C. Spoelstra as an expert witness. Mr. Spoelstra is a chemist and part owner of

a food service laboratory which does analytical work for food processors. He is experienced in bacteriological work and particularly on making chemical and bacteriological tests and examinations. This highly skilled expert testified that *frozen shrimp cannot be kept at a temperature above 20 degrees* and that if it is so kept, it starts deteriorating; that when the temperature reaches 25 degrees above zero, it approaches a very dangerous situation, and that frozen shrimp begins to defrost at between 20 and 25 degrees. [Tr. p. 111.]

He testified that *once a perishable food product such as frozen shrimp creole is defrosted, it cannot again be frozen and its quality restored.* He testified that if frozen produce is once defrosted and it is refrozen, one would be running into a terrific risk of putting a product on the market that is substandard. [Tr. p. 111.] He further testified that *if a defrosted food is refrozen and put on the market for sale, that when it is sold to the consumer, the merchandise will be off color and will be off flavor and off odor,* and further, that there is a great danger and possibility of bacteriological poisoning. [Tr. pp. 111-112.]

Mr. Spoelstra made various tests prior to his appearance in court. He testified that a package of frozen shrimp put into the refrigerator at 8 degrees below zero would completely defrost in the refrigerator itself in eleven hours if the refrigerator maintained a temperature of 40 degrees. In his experiment he found that after an eleven hour period in a temperature of 40 degrees, the juice was running out of the package. This testimony was not controverted nor was there any evidence offered in opposition to it. [Tr. pp. 110-111.]

The Court in its opinion reasoned that since 550 cases of shrimp were used by one of the consignees "they were in good condition." [Tr. pp. 15-16.] This reasoning is fallacious, unsound and contrary to the findings. There was no finding that the 550 cartons accepted by the consignee Pic'N'Time Frozen Foods were "in good condition." It is true that they were used in the course of trade but there was no evidence that they were in good condition. Since it is undisputed that 25 to 40 cartons were completely spoiled and that 415 cartons arrived at Bakersfield and San Francisco in a damaged condition and unfit for human consumption, it is fallacious to infer that the 550 cases disposed of in the course of trade were in good condition. The shrimp which was disposed of was not of first quality because it was refrozen. Mr. Dominis testified the shrimp was refrozen and Mr. Spoelstra testified that once a defrosted shrimp product is refrozen it lacks flavor, color or odor. There being no contrary evidence the Court must accept these facts as true.

Certainly the appellant should not be required to test each individual carton to determine its quality. The Court already found 450 cases to be damaged and not fit for human consumption. The fact that a portion was so visibly bad as to be deteriorated and rotten would cause suspicion to fall on the remainder of the merchandise rather than an inference that the remainder in the same car is good. If the car was improperly iced and a part of the merchandise was visibly rotten, the only reasonable deduction is that all of the merchandise in the car was affected. Since the shrimp was disposed of by the jobber to a wholesaler who in turn disposed of it to a retailer and eventually a consumer, it is impossible to determine what complaint was actually registered by the consumer.

By way of illustration, one may use a defective automobile tire for many miles without trouble but the fact that the tire is used without trouble does not establish that the tire was not defective. The defect may be unknown to the seller as well as to the buyer and still this does not establish that the tire was free from defect. If at a subsequent time the tire would blow out and it would appear that it was the result of a defect in the tire itself, we could properly conclude that this existed at the time the tire was placed on the car.

The fact that 550 hand-picked cartons of shrimp were actually disposed of in the trade is no indication that these 550 cartons were not spoiled. The witness Mr. Dominis testified that he told Belyea he wanted only hard cases. [Tr. p. 149.] Belyea testified and the Court found *he hand-picked the 550 cartons Dominis received.* [Findings of Fact 17—Tr. p. 24.] Dominis testified those which he received were immediately put in storage and frozen and moved or consumed in the regular channels within 45 to 60 days, as the item was scarce at the time. [Tr. p. 149.] They were disposed of without examination or chemical analysis of their condition or quality.

From these facts we cannot assume that the merchandise received by Dominis was of the quality of the product which the plaintiff used in its trade or business, because the undisputed testimony of the expert Spoelstra was to the effect that when a frozen food such as shrimp is defrosted it cannot again be frozen and still maintain its quality, its flavor or its fragrance. The mere fact that merchandise was used or was not spoiled to the degree where it was dangerous does not mean that the merchandise was unspoiled. The proper inference and conclusion to be drawn from these facts is that the mer-

chandise was bad and damaged, but that notwithstanding this condition, it was disposed of in the regular course of trade.

As heretofore pointed out, the shrimp creole taken from appellee's car was placed in a refrigerated truck which also contained frozen broccoli and frozen cauliflower. It was a modern, insulated, mechanically refrigerated truck and it was the uncontroverted testimony that the truck was capable of holding the temperature of any commodity placed in the truck and of reducing the temperature of the commodity if the temperature of the commodity was twenty-five degrees or greater. The frozen broccoli and frozen cauliflower arrived in Bakersfield and in San Francisco in good condition. The shrimp creole was rejected. Since the evidence was that nothing intervened between the time the shrimp left Los Angeles and the time it arrived in Bakersfield and San Francisco, the shrimp creole must have been damaged when it was delivered to appellant in Los Angeles. If we reasoned otherwise, we can find no explanation why the frozen broccoli and frozen cauliflower were received in good order when the shrimp creole in the same car arrived in a damaged condition and not fit for human consumption.

Since it is undisputed and the Court found that twenty-five to forty cartons of shrimp were so spoiled when the car was opened in Los Angeles as to be permitted to remain in the carrier's car as garbage to rot, we can only conclude that all of the shrimp which was delivered to the appellant in Los Angeles was damaged.

It is the undisputed law that where the shipper delivers a perishable food to a carrier for reshipment and where the perishable commodity arrived in a damaged

condition, the carrier owes the burden of proof to establish that he was free from neglect.

In the case of *Wilson & Co. v. Werner Transportation Co.,* 329 Ill. App. 533, 69 N. E. (2d) 713, in an action against a carrier where the evidence showed that the carrier left the vehicle overnight without icing, it was held that that was sufficient evidence to warrant recovery against the carrier.

III.

The Appellee Breached Its Contract of Carriage and the Negligence of the Appellee in Transporting the Merchandise Shipped by the Appellant Was the Proximate Cause of the Damage Suffered by Appellant.

It must be remembered that the merchandise was in the possession of the carrier until it was actually removed by the consignee. The carrier's obligations under its bill of lading continued until the shipment was actually removed by the consignee.

In the case of *Michigan Central Railroad Co. v. Mark Owen,* 256 U. S. 427, the Court held that where a carrier places a car on a public delivery track, no delivery has been made to the consignee until the merchandise in the car is actually removed by the consignee and this notwithstanding the fact that notice was given the consignee who accepted the car, broke the seals and started to unload. Under such circumstances, only access to the merchandise has been given and there is no delivery of property still in the car;

only a right that it may be removed. The railroad company remains liable as a carrier until such time as the property is actually removed.

Under the provisions of the Uniform Bill of Lading that property not removed within 48 hours after notice of its arrival may be kept in the car, depot or place of delivery, subject to the carrier's responsibility as warehouseman, the carrier's liability as carrier continues during the 48-hour period, unless the property is actually removed within that time. This rule applies notwithstanding the fact that the car is accepted by the consignee, the seals broken and unloading commenced. *Michigan Central Railroad Co. v. Mark Owen & Co., supra.* Even after the 48-hour period during which the consignee may permit the goods to remain in the car, the railroad company is liable under its bill of lading as a warehouseman for loss of goods from a car standing on its side track awaiting removal by the consignee. A railroad acting as warehouseman (as where the goods are permitted to remain in the car after the 48-hour period) is obligated at all times to protect property entrusted to its care. *United Metals Selling Co. v. Pryor,* 243 Fed. 91, *Lehigh Valley Railroad Co. v. State of Russia,* 21 F. (2d) 406.

Since the car was in the possession of the carrier until the merchandise was removed on April 11 and, since no ice or salt was added from the time the car left San Bernardino on April 8 until the time it was unloaded in Los Angeles on April 11, 64 hours and 25 minutes later,

with a temperature in Los Angeles of 88 degrees, the natural conclusion to follow is that the carrier failed to properly protect the merchandise in its custody. The damage was caused by the neglect of the carrier for which the carrier is liable. The Court found that a total of 450 cartons were damaged, contaminated and not fit for human consumption (35 left in the car and 415 removed to Bakersfield and San Francisco), and, therefore, the appellant should recover for the whole thereof which damages were stipulated to be in the sum of $4455, plus the loss of freight in the sum of $269.75.

In the case of *Southwestern Railroad Company v. Prescott,* 240 U. S. 632, 60 L. Ed. 836, the Court held that the removal of a part of the goods included in an interstate shipment does not discharge the carrier's liability under the bill of lading. The liability of the carrier remains until the entire shipment is removed.

Under the law in this case, even if the 550 cases which Pic'N'Time Frozen Foods received were undamaged, which we do not concede, since the remainder of the lading remained in the possession of the carrier until removed by the consignee, the defendant was liable for any damage to the remainder of the lading in the car. This consisted of 35 cases left in the car as too spoiled to move and 415 cases which the Court found were damaged upon arrival in Bakersfield and San Francisco. Appellant therefore is entitled to recover its total loss, the defendant having failed to maintain its burden of proof that it was free from negligence.

IV.

The Amount Allowed to the Appellant for Damages Is Inadequate, Unreasonable, Arbitrary and Is Contrary to the Findings of Fact and the Weight of the Evidence. The Court Should Have Granted Judgment for the Full Damages Sustained.

In the instant case, the Court having found that the shrimp was delivered to the carrier in a good and frozen condition and the Court having found that some of the merchandise arrived at its destination damaged, the burden was on the appellee to show that either there was no damage or that it was free from neglect. The appellee failed to maintain this burden of proof. The appellee introduced no evidence which in any way showed that the shrimp creole rejected in Bakersfield and San Francisco was undamaged, uncontaminated or salable when it was delivered to appellant in Los Angeles. On the contrary, *the appellee stipulated and the Court specifically found that this shrimp creole arrived in Bakersfield and San Francisco in a damaged condition and that it was contaminated and not fit for human consumption, and that there was a total loss of $4,455.00, plus loss of freight in the sum of $269.75.*

Since there was no finding that the appellee was free from negligence and the Court having found that the shrimp was damaged, the appellant should have had judgment for its total loss.

The conclusions of law labeled in the Findings of Fact and Conclusions of Law Nos. 1, 2, 3, 4, 5, 6, 7, 8 and a portion of 9 were erroneously labeled Conclusions of Law. They should have been labeled Findings of Fact and considered as such.

It is immaterial that findings of fact are found among conclusions of law. If it is a finding of fact, it should be so treated by an appellate court. *Lindberg v. Stanto,* 211 Cal. 771, 776, 297 Pac. 9, 75 A. L. R. 555; *Gossman v. Gossman,* 52 Cal. App (2d) 184, 191, 126 P. (2d) 178; *Lockard v. City of L. A.,* 85 A. C. A. 202, 192 P. (2d) 110.

The conclusions of law drawn from the facts as found by the Court were erroneous and the Court erred in giving appellant damages for *only the visibly spoiled merchandise.* It should have given appellant damages *for all of the damaged merchandise,* that which was visible and that which was subsequently ascertained to be damaged. It is apparent that the findings of fact are in conflict with the conclusions of law and the judgment.

The Court in its Conclusion of Law No. 8 [Tr. p. 28] found "that the only visible damage was to 40 cases of shrimp creole." It infers that there may have been damage to additional cases, but that the damage was not visible and this inference is cured by the finding No. 21 [Tr. p. 25] which found that 415 cartons were damaged. Again, Conclusion 9 [Tr. p. 28] stated "Since only 40 cases were *visually discovered to be damaged* at the time the merchandise was taken from the car in Los Angeles" (italics ours), it is apparent that the Court was of the opinion that the balance of the shrimp creole was damaged but that it was not *"visually discovered to be damaged at the time the merchandise was taken from the car in Los Angeles."* This conclusion when read together with

Finding 21 [Tr. p. 25] *"that 415 cartons were received at Bakersfield and San Francisco in a damaged condition, and was contaminated and was not fit for human consumption,"* can lead to only one conclusion—that the 415 cartons were damaged, but the damage was not visually discovered when the merchandise was taken from the car. The damage was, however, discovered shortly thereafter when the merchandise was examined in Bakersfield and San Francisco. This, read in the light of the facts as found by the Court, to-wit, that the car arrived in Los Angeles at a temperature of 54 degrees; that the car appeared warm; that there was no rush of cold air or vapor which usually appears when the door of a properly iced and cooled car arrives on a warm day; that from 25 to 40 cartons were so wet, soft, defrosted and spoiled as to be rotten, can lead to only one conclusion, that the appellant is entitled to judgment for the full amount of its damages as found by the Court.

For the trial court to have allowed damages for 40 cases of shrimp, it must have concluded that the appellant made out a *prima facie* case and that appellee failed to sustain its burden of proof that it was free of negligence. Any other reasoning or conclusion would have prevented appellant's obtaining any recovery. If such negligence existed, and the trial court found that it did, such negligence must apply to all of the lading in the car which appellees stipulated and the trial court found was damaged. This consisted of 450 cartons and not only those left to rot. Since it was stipulated that appellant's damage was $9.90 per carton plus the loss of freight, appellant was entitled to judgment in the sum of $4455.00, plus its loss of freight in the sum of $269.75.

Conclusion.

The Court found that the appellant met its burden of proof that the merchandise was shipped in a good and merchantable condition and found that appellant made out a *prima facie* case when it presented evidence of the car arriving in poor condition, and the merchandise spoiled.

The burden then shifted to the appellee to show that the merchandise was undamaged or that it was free from negligence. This it failed to do. It was unnecessary for the appellant to prove that each and every case was damaged. The mere showing that there was visible evidence of a warm car with a high temperature of 54 degrees and that there was damage to some of the cartons of shrimp creole shifted the burden to the appellee to prove that the merchandise was not damaged. This the appellee failed to do.

Since the Court specifically found that 450 cases were damaged and that the appellant's damage thereby was $4455.00 plus its loss of freight in the sum of $269.75, it therefore follows that the Court improperly fixed the damages of the appellant and that the appellant is entitled to recover for its total loss of $4,724.75; and we respectfully submit that judgment should be entered in favor of the appellant and against the appellee Santa Fe, in said amount, together with interest from April 2, 1946 and costs of suit.

Respectfully submitted,

ALBERT H. ALLEN and
HYMAN GOLDMAN,
By ALBERT H. ALLEN,
Attorneys for Appellant.

SEP 2 1948
PAUL P. O'BRIEN,
CLERK

No. 11961.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HAMILTON FOODS, INC.,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Kansas corporation, JACK BELYEA, doing business as REFRIGERATED EXPRESS COMPANY, DOE ONE, DOE TWO, DOE THREE and DOE FOUR,

Appellees.

PLEADINGS AND JURISDICTIONAL STATEMENT.

The complaint of the appellant, Hamilton Foods, Inc., against the appellees, the Atchison, Topeka & Santa Fe Railway Company and Jack Belyea, doing business as Refrigerated Express Company, alleges the necessary jurisdictional facts as follows:

That appellant is a corporation organized and existing under the laws of the State of Illinois and having its principal place of business in that state. That the defendant appellee, Santa Fe, is a corporation organized and existing under the laws of the State of Kansas and having its principal place of business in Los Angeles, Cali-

fornia. That the defendant, Jack Belyea, is a resident of the City of Los Angeles, State of California. That the matter in controversy exceeds, exclusive of costs, the sum of three thousand dollars ($3,000.00) and the jurisdiction of the United States District Court for the Southern District of California, Central Division, is invoked on the grounds of diversity of citizenship.

That the defendant appellee, Santa Fe, is a common carrier engaged in the business of carrying merchandise in interstate commerce. That in the course of its business, it issued a bill of lading to the plaintiff for the carriage of one thousand (1,000) cartons of frozen vegetables and shrimp. That it was negligent in transporting said lading and did not comply with the terms of the bill of lading in transporting said lading. That by reason of the negligence of the appellee, Santa Fe, and its breach of its contract of carriage as set forth in the bill of lading, the appellant was damaged in the sum of $4,455.00, being the reasonable value of the merchandise damaged, and in addition thereto, the sum of $294.75 for freight for hauling said merchandise.

The complaint contains a second cause of action against the defendant Belyea for failing to properly trans-ship the shrimp creole from Los Angeles, California, to Bakersfield and San Francisco. [Tr. pp. 2-7.]

The appellee, Santa Fe, filed an answer which denied on information and belief the plaintiff's place of business, but admitted that it was a Kansas corporation, that it was a common carrier of freight between Chicago, Illinois and Los Angeles, California and admitted that it received from the plaintiff at Chicago, Illinois one thousand (1,000) cartons of vegetables and shrimp for trans-

portation to Los Angeles. The answer denies negligence on the part of the appellee or violation of the terms of the bill of lading, as well as setting forth other defenses. [Tr. pp. 7-11.]

The answer of the defendant Belyea likewise denies all liability, but admits that the appellant is an Illinois corporation and that the appellee defendant, Santa Fe, is a Kansas corporation with its principal office in Los Angeles. In addition, the defendant Belyea alleges that he is a resident of the City of El Monte, California. [Tr. pp. 11-13.]

The trial court found that the appellant is an Illinois corporation with its principal place of business in Chicago, Illinois, that the appellee, Santa Fe, is a Kansas corporation with its principal place of businesss in Los Angeles, California, and that the defendant Belyea is a resident of the City of El Monte, County of Los Angeles, State of California. [Finding 1, Tr. p. 18.]

That the United States District Court for the Southern District of California, Central Division, had jurisdiction to try the herein action by reason of Act of April 20, 1940, Chap. 117, 54 Stat. 143, 28 U. S. C. A., Sec. 41(1).

This Honorable Court has jurisdiction of this appeal in that it is sought to review by appeal a final decision of a District Court of the United States for the Southern District of California, Central Division, which is within the Ninth Circuit. (Act of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 936, 28 U. S. C. A., Sec. 225, as amended May 9, 1942, Chap. 295, 56 Stat. 272.)

CONCISE ARGUMENT OF THE CASE.

We submit that, stated most briefly, the position of the trial court should have been this:

I.

The appellant, Hamilton Foods, Inc., delivered to the appellee, Santa Fe, 1,000 cases of frozen shrimp creole in a good, frozen and merchantable condition for carriage to Los Angeles, California, in a refrigerated car. That the car was initially and properly iced by the appellant.

II.

That the appellee, Santa Fe Railway, failed and neglected to carry the lading properly and negligently failed to ice and salt the lading as required by the terms of the bill of lading.

III.

That 450 cartons of the lading arrived in Los Angeles in poor condition, unfit for human consumption. That the damage to the goods was caused by the negligence of the appellee, Santa Fe, in failing to properly carry the lading in accordance with the contract of carriage and in failing to properly ice and salt the lading in accordance with the instructions of the appellant.

IV.

That the appellant is entitled to judgment against the appellee, Santa Fe, in the sum of $4,455.00, being the reasonable value of the lading damaged, together with the cost of freight thereon in the sum of $294.75, plus interest from April 1, 1946, at the rate of seven per cent (7%) per annum.

SPECIFICATION OF ERRORS.

It is respectfully submitted that since the Court found:

(a) That the shrimp creole was in a good and frozen condition when delivered to the carrier [Findings 4, 5, 6, 7 and 8, pp. 19-21], and

(b) That the shrimp creole arrived in a car which was warm and had a temperature of 54 degrees, and that the visible cartons of shrimp near the door were wet, soft, defrosted and spoiled [Finding 16, pp. 23-24], and

(c) That upon arrival in Los Angeles, 415 cartons were transported in a refrigerated truck to Bakersfield and San Francisco, which truck was in good working order, properly insulated, with good mechanical refrigeration [Findings 19, 20, 21, pp. 24-26], and

(d) That this truck which transported the shrimp creole to Bakersfield and San Francisco likewise carried frozen cauliflower and frozen broccoli, which was received and accepted in Bakersfield and San Francisco in a good and frozen condition [Finding 19, pp. 24-25], and

(e) That 415 cartons arrived in Bakersfield and San Francisco in a spoiled condition and not fit for human consumption [Finding 21, p. 25], and

(f) That there was no negligence on the part of the defendant Belyea who trans-shipped the shrimp from Los Angeles to Bakersfield and San Francisco [Finding 24, p. 26], and

(g) That the appellant established a *prima facie* case [Conclusion of Law 1, p. 26].

The Court erred in its conclusion:

(a) That the appellee was liable only for the 25 to 40 cartons which were visibly spoiled and rotten [Conclusion of Law 9, p. 28];

(b) That the appellee was not liable for the damage to the 415 cartons which the Court found were received in Bakersfield and San Francisco in a damaged condition and not fit for human consumption [Conclusion of Law 9, p. 28];

(c) In concluding that it was necessary to make full discovery of the damaged cartons immediately upon making the lading available to appellant [Conclusion of Law 9, p. 28].

(d) In its conclusion that since the merchandise was re-shipped from Los Angeles to Bakersfield and San Francisco, and having arrived there in a damaged condition, from the circumstances, it would appear that the Railroad Company complied with the protective tariff regulations and with the bill of lading under which it was governed in delivery of the shipment to its track in Los Angeles [Conclusion of Law 7, p. 28];

(e) In giving appellant damages for only forty (40) cartons visibly spoiled when the Court by its Findings of Fact and Conclusions of Law found that a total of 450 cartons of shrimp creole were spoiled and that appellant suffered damages of $9.90 per carton or a total of $4,455.00, plus freight in the sum of $294.75 [Conclusion of Law 9, p. 28].